

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AL TERRA AMERICA INSURANCE CO.,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE, et al.

Defendant.

Index No. 652813/2012 E

Hon. Andrea Masley

**AFFIRMATION OF
IRREPARABLE HARM**DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652933/2012 E

Hon. Andrea Masley

Motion Seq. No. _____

SETH B. SCHAFER, of full age, hereby affirms as follows:

1. I am a Partner of the law firm of Proskauer Rose LLP, counsel for non-parties the Arizona Cardinals Football Club, LLC, the Chargers Football Company, LLC, the Forty Niners Football Company, LLC, The Los Angeles Rams, LLC, The Oakland Raiders, LLP, PDB Sports, Ltd. d/b/a Denver Broncos, the Jacksonville Jaguars, LLC, the Miami Dolphins, Ltd., the Buccaneers Team LLC, the Atlanta Falcons Football Club, LLC, The Chicago Bears Football Club, Inc., the Indianapolis Colts, Inc., the New Orleans Louisiana Saints, LLC, the Baltimore Ravens Limited Partnership, Pro-Football, Inc. d/b/a Washington Redskins, the New England Patriots, LLC, The Detroit Lions, Inc., the Minnesota Vikings Football Club, LLC, the Kansas City Chiefs Football Club, Inc., the New York Jets, LLC, the Panthers Football, LLC d/b/a Carolina Panthers,

the Cincinnati Bengals, Inc., the Cleveland Browns Football Company, LLC, the Philadelphia Eagles, LLC, the Pittsburgh Steelers, LLC, the Tennessee Football, Inc., the Dallas Cowboys Football Club, Ltd., Houston NFL Holdings, LP d/b/a Houston Texans, Football Northwest, LLC d/b/a Seattle Seahawks, the Green Bay Packers, Inc., the Buffalo Bills, LLC and the New York Football Giants, Inc. (collectively, the “Non-Party Teams”), which were each served with nearly identical subpoenas seeking voluminous and burdensome third-party discovery (collectively, the “Subpoenas”) in connection with the above-captioned insurance coverage actions (the “Coverage Actions”).

2. I respectfully submit this Affirmation in support of the Non-Party Teams’ motion for a protective order pursuant to CPLR 3103(a): (a) directing TIG Insurance Company, The North River Insurance Company, United States Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Bedivere Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, Arrowood Indemnity Company, and Westport Insurance Corporation (collectively, the “Insurers”) to withdraw or stay all other proceedings they have commenced in any other jurisdiction against any of the Non-Party Teams seeking to compel compliance with the Subpoenas; (b) directing the Insurers not to commence any other proceedings in any other jurisdiction to compel compliance

with the Subpoenas; and (c) referring resolution of the proposed consolidated proceeding to Special Referee Dolinger to set a briefing schedule to hear and resolve all issues relating to the Subpoenas.

3. I further submit this affirmation in support of the Non-Party Teams' request for a temporary restraining order ("TRO") to temporarily enjoin the Insurers from litigating issues relating to the Subpoenas in other jurisdictions so as to maintain the status quo while this Court rules on the Non-Party Teams' motion for a protective order

4. This Affirmation is based on my personal knowledge of the facts and circumstances contained herein, the source of my knowledge being the records and files maintained by my office in the ordinary course of handling this matter, and my review of materials filed on the electronically available dockets in the Coverage Actions.

The NFL Players' Claims Against the NFL

5. In or about July 2011, seventy-three former football players sued the National Football League (the "NFL") in the Superior Court of California, alleging that it failed to take reasonable actions to protect them from the chronic risks of head injuries. The NFL removed the case to federal court, and more lawsuits by retired players followed. In January 2012, the MDL Panel consolidated these cases before Judge Anita B. Brody in the Eastern District of Pennsylvania (the "MDL Action"). Since consolidation, approximately 5,000 players have filed over 300 similar lawsuits against the NFL. *See In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 421 (3d Cir. 2016).

6. In the Second Amended Master Administrative Long-Form Complaint Against NFL Defendants (*In re: National Football League Retired Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB, MDL No. 2323, Dkt. No. 8026 (the "MDL Complaint"), ¶¶ 3, 7-8, 12, 44), the NFL players sought a declaration that the NFL knew that repeated concussive or subconcussive

impacts likely put the NFL players at substantially-increased risks of developing one or more latent neurodegenerative diseases or conditions; that having voluntarily undertaken to study this problem, the NFL had a duty to advise the NFL players of the heightened risk and dangers of the latent impacts of blows to the head and the subconcussive impacts resulting therefrom; and that “the NFL willfully and intentionally concealed from and misled the [NFL players] concerning that risk and dangers.” (MDL Complaint, ¶ 334.) In addition, the NFL players asserted various claims against the NFL for negligence, negligent marketing, negligent misrepresentation, negligently hiring, negligent retention/supervision, and fraud. (MDL Complaint, ¶¶ 336-350, 362-396.)

The Insurers Commence the Coverage Actions But Discovery is Stayed Pending Settlement Discussions in the MDL Action Ensued

7. While the MDL Action was pending, in August 2012, the Insurers commenced consolidated actions (*i.e.*, the Coverage Actions) against the NFL and NFL Properties, LLC (collectively, the “NFL”), asserting that the Insurers had no duty to defend or indemnify the NFL against the claims asserted against them in the MDL Action. (Index No. 652813/2012, Dkt. No. 1.)

8. On April 12, 2013, this Court issued a Preliminary Conference Order setting a discovery schedule (Index No. 652813/2012, Dkt. No. 291), but as settlement efforts in the MDL Action progressed, the parties to the Coverage Action agreed to stand down on further discovery. (Index No. 652813/2012, Dkt. No. 475 (p. 6)).

9. On or about May 8, 2015, the parties to the MDL Action ultimately reached a court-approved settlement that covered over 20,000 retired NFL players and released all concussion-related claims against the NFL, which settlement contained, *inter alia*, the following three components: (a) an uncapped “Monetary Award Fund” that provides compensation for retired NFL players who submit proof of certain diagnoses; (b) a \$75 million Baseline Assessment Program that

provides eligible retired NFL players with free baseline assessment examinations of their objective neurological functioning; and (c) a \$10 million Education Fund to instruct football players about injury prevention. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 420-23; Index No. 652813/2012, Dkt. No. 403(p. 4); Index No. 652813/2012, Dkt. No. 475 (p. 4). More than 150 players opted out of the MDL settlement, and the MDL Action is now comprised of the class settlement and the opt-out litigation. (Index No. 652813/2012, Dkt. No. 403 (p. 5).)

10. During a November 16, 2015 conference in the Coverage Actions, this Court determined that discovery should proceed. (Index No. 652813/2012, Dkt. No. 475 (p. 6).) On February 1, 2017, the Insurers served their Second Omnibus Demand for Discovery and Inspection seeking, *inter alia*, documents and communications from the NFL related to the MDL Action and the settlement thereof (the NFL's "Defense Files"). (Index No. 652813/2012, Dkt. No. 475 (p. 7); Index No. 652813/2012, Dkt. No. 476 (Ex. G).)

11. Beginning in August of 2017, the Insurers began serving subpoenas for documents in the Coverage Action on Non-Party Teams (the "Subpoenas"). (A sample subpoena issued to the Buffalo Bills is annexed hereto as **Exhibit A.**) The Insurers then took another full year between August 20, 2017 and August 8, 2018 to serve all 32 Non-Party Teams with the Subpoenas. (Notably, counsel for the Non-Party Teams promptly notified the Insurers when multiple Non-Party Teams were served under non-existent or incorrect entity names, so that such mistakes could be corrected and the proper entities could be promptly served.)

12. The Subpoenas to each of the Non-Party Teams are virtually identical and seek the following documents:

(a) **all documents regarding what the Insurers define as "Alleged Brain Injuries"** (Requests 1-12, 19-21, and 31-34), including (i) all research or studies conducted by the

NFL or the Non-Party Teams; (ii) all communications between or among (1) the NFL, the Non-Party Teams and anyone on the following NFL committees: (I) Mild Traumatic Brain Injury Committee; (II) Head, Neck and Spine Committee; and (III) Injury and Safety Panel Committee; (2) the Non-Party Teams, but not shared with the NFL or the aforementioned NFL Committees; and (3) the NFL, the Non-Party Teams; (iii) each Non-Party Team's weekly injury reports relating to any Alleged Brain Injuries; (iv) ProCap; (v) the book *League of Denial*; (vi) the movie *Concussion*; and (vii) the June 19, 2017 Concussion Summit held in Chicago;

(b) **all documents regarding workers compensation and other claims against the NFL and/or any of the Non-Party Teams relating to any Alleged Brain Injuries** (Requests 13-18 and 22-27), including: (i) all workers compensation claims by any players; (ii) any potential or actual lawsuits by any current or former player involving Alleged Brain Injuries; (iii) the costs incurred to defend and/or settle the MDL Action and the Class Action Settlement; (iv) the funding of the NFL's and/or the Non-Party Teams' defense costs in the MDL Action; (v) the Non-Party Teams' approval of the Class Action Settlement; and (vi) the NFL's and/or the Non-Party Teams' analysis of players' claims regarding any Alleged Brain Injuries, the defenses to such claims, the valuation of such claims, and the potential or actual settlement of such claims;

(c) **all documents regarding the corporate relationship between the NFL and the Non-Party Teams** (Request 28);

(d) **all documents regarding any indemnity agreements between the Non-Party Teams and the NFL** (Requests 29-30);

(e) **copies of any general liability policies issued to the Non-Party Teams** (Request 35); and

(f) **the Non-Party Teams' document retention or destruction policies**

(Request 36).

The Insurers Fail to Meet and Confer in Good Faith on the Non-Party Teams' Objections and Responses, Continually Refusing to Narrow Their Overly Broad Discovery Requests in Any Respect

13. Each of the Non-Party Teams timely served their respective objections and responses to the Subpoenas. Starting in January 2018, the Insurers and the Non-Party Teams engaged in meet and confer sessions on January 18, 2018 and March 9, 2018, in which they discussed procedural issues and the Insurers' request that the Non-Party Teams produce some limited scope of documents, without addressing the merits of the Non-Party Teams' objections. No agreement concerning the scope of production was proposed or discussed during any of those conversations.

14. Rather than continuing to meet and confer in "good faith," the Insurers sent a 16-page letter on September 24, 2018, insisting upon *full production* without narrowing their requests in any respect. While they proposed to prioritize their requests, the Insurers made clear that they "do not waive, withdraw or modify their Requests. Nor do they agree that the [Non-Party Teams] are not obligated to respond fully to all of the Requests." (Emphasis in original.) The Insurers then proposed an initial list of ESI search terms but made clear that "[t]his is not an exhaustive list of relevant terms" (emphasis in original), thus confirming the Insurers' intentions to require the Non-Party Teams to engage in multiple, costly and likely duplicative searches, subject only to the Insurers' whim as to when, if ever, that process might cease.

15. Despite the absence of any willingness to compromise by the Insurers, the Non-Party Teams pressed forward, sending an October 11, 2018 letter in the hopes of reaching a mutually acceptable resolution to the Subpoenas. That letter explained that:

- a. the Non-Party Teams would be producing their current document retention policies (to the extent they exist) in response to Request No. 36;
- b. based on the allegations and claims asserted in the MDL Action, the only relevant information is the NFL's knowledge concerning what the Insurers define as Alleged Brain Injuries. To the extent information was not conveyed to the NFL, it is irrelevant to the Coverage Actions. If it was conveyed by one or more of the Non-Party Teams to the NFL, then it is clearly in the NFL's possession and should be sought from the NFL, which is a party to the Coverage Action. To the extent the Insurers' concern was the completeness of the NFL's own production, the Non-Party Teams suggested that the most reasonable and efficient way to proceed would be to await production by the NFL so the Insurers could then identify those documents in the Non-Party Teams' possession that were missing from the NFL's production. If the Insurers were unwilling to agree to this approach, the Non-Party Teams were nonetheless willing to meet and confer on specific search terms and custodians that would target relevant documents conveyed by the Non-Party Teams to the NFL;
- c. the Non-Party Teams further agreed to meet and confer on ESI search terms to do *one comprehensive search*, with an agreement to supplement or change if a term was deemed to be too under- or over-inclusive based upon search results, before any electronic searches were undertaken;
- d. the Non-Party Teams further expressed their understandable reluctance to provide private personal medical information that is subject to the Health Insurance Portability and Accountability Act, the Americans with Disabilities Act, and various other state privacy laws. To the extent relevant, such information would necessarily have been conveyed to the NFL and would be in the NFL's possession. Nonetheless, the Non-Party Teams stated that they would be willing to

meet and confer to allow the Insurers to make a “compelling case” for their production by the Non-Party Teams;

e. the Non-Party Teams explained that the general protective order in the Coverage Actions was insufficient, particularly to address confidentiality concerns that the Non-Party Teams had in relationship to one another. The Non-Party Teams were willing to enter into a supplemental agreement that afforded them sufficient protections;

f. while the Non-Party Teams were currently standing on their temporal scope objection (which demanded, in certain cases, the production of documents over *a 60+ year period – including years after the commencement of litigation against the NFL*), they were nonetheless willing to meet and confer on this issue to understand the Insurers’ theory of relevance;

g. while the practice in this Court was to provide for categorical privilege logs (*see* 22 N.Y.C.R.R. § 202.70(g)) to avoid unnecessary burden and cost, the Non-Party Teams were willing to meet and confer as to the need for a document-by-document privilege log, as the Insurers demanded; and

h. contrary to the suggestions in the Insurers’ September 24th letter, the Non-Party Teams: (i) were not objecting on the grounds that the requests were unduly burdensome because my firm represented all 32 Non-Party Teams; (ii) were willing to produce documents electronically and would not be withholding documents on the basis that the subpoenas improperly seek documents to be produced in a foreign jurisdiction; (iii) were not intending to withhold any documents retrieved and reviewed that were otherwise relevant on the ground that the subpoenas sought identical documents from each of the Non-Party Teams; and (iv) would not withhold documents retrieved and reviewed that are otherwise responsive on the basis of their objections to the definitions in the Subpoenas.

16. On November 14, 2018, the Insurers responded by refusing to “address[] on a point-counterpoint basis each of the issues raised in [the Non-Party Teams’] October 11, 2018 letter.” They similarly refused to address or explain why the reasonable compromises proposed by the Non-Party Teams were unworkable or to propose any other alternatives, and instead retreated to their refrain of requiring full compliance with the Subpoenas.

Special Referee Dolinger’s February 26, 2019 Decision and Order

17. While the Insurers and the Non-Party Teams were in the midst of meeting and conferring regarding the Subpoenas, in April 2018, the Insurers and the NFL (the parties to the Coverage Actions) entered into a “So Ordered” stipulation for the appointment of the Hon. Michael H. Dolinger (Ret.) of Jams, pursuant to CPLR 3104, to act as a referee to supervise all disclosure between the parties to the Coverage Action. (Index No. 652813/2012, Dkt. Nos. 456, 458.) Thereafter, the NFL and the Insurers appear to have engaged in motion practice over numerous discovery issues pending between the parties to the Coverage Actions, including the Insurers’ discovery requests to the NFL to produce their Defense Files, damages-related information, copies of indemnity agreements between the NFL and the Non-Party Teams, and the appropriate ESI search terms and custodians.

18. On February 26, 2019, in an 81-page Memorandum and Order, Special Referee Dolinger resolved those discovery disputes, and, in particular:

- a. denied the Insurers’ demand that the NFL produce their Defense Files on privilege grounds (Index No. 652813/2012, Dkt. No. 509 (pp. 6-25));
- b. denied the Insurers’ demand that NFL produce additional damages-related information, including information relating to “claims filed under the MDL settlement agreement and payments made, as well as defense costs,” because the NFL had been “providing the [Insurers]

with, among other documentation, ‘detailed summaries of settlement registration data and all settlement claim resolution and claim payment details’ prepared by the settlement claims administrator” and the NFL further “agreed to produce on a periodic basis the back up documentation for the spreadsheets that had been and are still being provided on a continuing basis covering claim resolution and claim payment details in a claimant specific format.” Special Referee Dolinger held that the NFL’s commitment to providing such materials satisfied its “obligation to provide specific settlement damages information at this stage of the litigation” (Index No. 652813/2012, Dkt. No. 509 (pp. 54-55);

c. denied the Insurers’ demand that the NFL produce any indemnification-related agreements between the Non-Party Teams and any manufacturing entities based on the NFL’s representation that “there is no indemnification agreement that would be pertinent to the current case, and that any obligations of the [Non-Party Teams] to indemnify the [NFL] under any scenario are reflected in the by laws of the [NFL], which have been produced to the carriers, along with the [NFL’s] constitution” (Index No. 652813/2012, Dkt. No. 509 (p. 56); and

d. limited the Insurers’ proposed ESI search terms and custodians, the specifics of which have been redacted (Index No. 652813/2012, Dkt. No. 509 (pp. 47-54).

19. All of the above rulings by Special Referee Dolinger limiting or denying discovery sought by the Insurers of the NFL are equally applicable to the documents sought by the Insurers from the Non-Party Teams via the Subpoenas. In fact, they are doubly applicable here because the the permissible scope of non-party discovery cannot be broader than party discovery.

20. On March 19, 2019, the NFL and the Insurers executed a stipulation that was subsequently “So Ordered” by this Court which represented that “the parties received an order from Special Referee Dolinger on five disclosure-related motions and are currently in the process of

briefing objections to certain of Special Referee Dolinger's rulings;" and proposed to extend the deadline to complete all fact discovery to April 30, 2020. (Index No. 652933/2012, Dkt. No. 532.)

**Without Any Warning or Effort to Meet and Confer in Good Faith
After Special Referee Dolinger's Rulings Were Issued, the Insurers Began
Filing Motions to Compel Against the Non-Party Teams in Various Jurisdictions**

21. Given the pendency of the party discovery motions before Special Referee Dolinger, which necessarily impacted the scope of discovery being sought from the Non-Party Teams, and the Insurers' subsequent objections to aspects of his rulings, the Non-Party Teams presumed that the Insurers were waiting to resolve those issues before circling back to meet and confer with the Non-Party Teams concerning the Subpoenas.

22. However, in April 2019, without any forewarning, and while the Insurers' objections to Special Referee Dolinger's discovery rulings were still pending, the Insurers ignored their obligation to meet and confer in good faith in compliance with 22 N.Y.C.R.R. 202.7(a) and Rule 14 of the Commercial Division Rules, and instead begin filing actions across the country to compel enforcement of the Subpoenas to the Non-Party Teams.

23. Between April 5 and 22, 2019, the Insurers began commencing separate actions in various foreign jurisdictions to compel compliance with the subpoenas issued to: (a) the New York Giants and the Buffalo Bills in this Court; (b) the Baltimore Ravens and Washington Redskins (in separate Maryland state court proceedings); (c) the Atlanta Falcons (in Georgia); (d) the Carolina Panthers (in North Carolina); (e) the Chicago Bears (in Illinois); (f) the Dallas Cowboys and the Houston Texans (in separate Texas state court proceedings); (g) the Denver Broncos (in Colorado); (h) the Indianapolis Colts (in Indiana); (i) the Jacksonville Jaguars, Miami Dolphins and the Tampa Bay Buccaneers (in separate Florida state court proceedings); (j) the Kansas City Chiefs (in Missouri); (k) the New York Jets (in New Jersey); and (l) the Philadelphia Eagles and the Pittsburgh

Steelers (in separate Pennsylvania state court proceedings). And, the Insurers have advised that they intend to commence separate actions against all of the Non-Party Teams in each of their respective local jurisdictions.

24. Incredibly, the Insurers' various state court proceedings make only passing reference to Special Referee Dolinger's February 26, 2019 Decision and Order, and fail to forthrightly explain at all how it addresses and thus squarely impacts a number of the discovery requests in the Subpoenas. The only logical explanation is that the Insurers are attempting an end run around Special Referee Dolinger's rulings.

The Non-Party Teams Will Suffer Irreparable Harm Absent the Requested Relief

25. The threat of irreparable harm is not some distant concern. For example, on April 22, 2019, the Insurers filed a discovery proceeding in Indiana state court against the Indianapolis Colts to compel compliance with the Subpoena issued to that team, and the Indiana court issued an order *that same day* requiring production of all responsive documents within 30 days – *without a hearing or providing the Indianapolis Colts with any other opportunity to be heard*. The Indianapolis Colts are now preparing papers seeking reconsideration of that ruling. In addition, a hearing was scheduled in Pennsylvania state court for April 25, 2019 in a proceeding against the Philadelphia Eagles, and only at the last minute did the Insurers agree not to pursue that motion without prejudice when that court refused to adjourn that hearing on consent of the Philadelphia Eagles and the Insurers. Moreover, there are additional imminent deadlines. Just by way of example: (a) there is a hearing currently scheduled in the Illinois action against the Chicago Bears for May 6, 2019; (b) another hearing is currently scheduled in the Pennsylvania action against the Pittsburgh Steelers for May 10, 2019; and (c) there are May 13, 2019 deadlines in the two Maryland proceedings against the Baltimore Ravens and the Washington Redskins.

26. Unless the Insurers' multiple proceedings to compel compliance with the Subpoenas are consolidated in one proceeding before this Court and the Insurers are enjoined from litigating such issues in numerous other jurisdictions, the Non-Party Teams will likely face immediate and irreparable injury by having to litigate the identical discovery issues in 32 separate court proceedings in 22 different states, with the real possibility of this resulting in a variety of inconsistent discovery rulings that may obligate one or more of the Non-Party Teams to have inconsistent discovery obligations, including a potential requirement to produce documents that Special Referee Dolinger ruled were either not required to be produced (*e.g.*, the indemnity and damages-related documents) or were held to be privileged (*e.g.*, the Defense Files). Indeed, if one or more Non-Party Teams are required to produce the Defense Files, it would seriously impact the privileged nature of those documents held by other Non-Party Teams and/or the NFL with whom such documents may have been shared.

WHEREFORE, it is respectfully requested that the Court grant the Non-Party Teams the relief they have requested in their Order to Show Cause.

Dated: April 25, 2019



SETH B. SCHAFLER

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I certify that this affirmation complies with the 7,000-word limit under Commercial Division Rule 17. This computer generated affirmation was prepared using Microsoft Word, and based on Microsoft Word's word count function, the total number of words in this affirmation, including of point headings and footnotes and exclusive of the caption and signature block is 3,948.

Dated: April 25, 2019



SETH B. SCHAFLER